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No. 87-1167

In the Supreme Court of the United States

OCTOBER TERM, 1987

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether, in this Title VII disparate treatment action, the court of appeals properly held that evidence of sexual stereotyping placed the burden of persuasion on the defendant to show by clear and convincing evidence that the decision against promoting respondent to partner was caused by reasons other than intentional sex discrimination.

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INTEREST OF THE UNITED STATES

This case presents important issues concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The United States has responsibility for enforcing that statute. Moreover, the United States, as the nation's largest employer, is governed by Title VII's requirements.

STATEMENT

1. Petitioner is an accounting firm that, at the time this action was commenced, had 662 partners in 90 offices. New partners are selected from the ranks of senior managers through a formal recommendation-and-review process. Partners in a local office propose a candidate for admission. Each of the firm's partners is then invited to complete evaluation forms that request information regarding the candidate's business development, technical expertise, and interpersonal skills. The partners are also

asked to make a "bottom line" recommendation—*i.e.*, whether to admit, deny, or defer consideration. Pet. App. 41a-42.

Petitioner's Admissions Committee reviews each candidate's file and interviews partners to supplement the written evaluations. The Admissions Committee prepares a summary of the evaluations. The Committee then makes recommendations to the firm's Policy Board, which decides whether to put a candidate to a vote before the partnership, to deny admission, or to place a candidate on "hold" for a specified period. Pet. App. 41a-42a.

In 1982, respondent Hopkins was proposed for partnership. She was the only woman among the 88 candidates that year. Respondent had been successful as a senior manager at petitioner. She played a pivotal role in securing important government contracts, and had the best record of the 88 candidates in terms of obtaining major contracts. Respondent had no difficulty dealing with clients, and her clients were very pleased with her work. Respondent was viewed as a highly competent project leader who worked long hours. Pet. App. 43a.

A number of petitioner's partners, however, told the Admissions Committee that respondent had trouble with "interpersonal skills"—in particular, that she was overly aggressive, unduly harsh, difficult to work with, profane, and impatient with the staff. Eight of the 32 partners who submitted written evaluations recommended that she be denied admission; three favored placing her candidacy on hold, and eight stated that they had an insufficient basis for an opinion. Based on the number of "no" votes and the negative comments, the Admissions Committee recommended that "she should be HELD at least a year" (Pet. App. 44a). The Policy Board agreed. A few months later, two partners in respondent's home office decided that they could no longer support her candidacy. Without such support, respondent had no chance of becoming a partner. She resigned, started her own firm, and commenced this action against petitioner for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 43a-44a.

2. At trial, respondent presented evidence to support three theories of liability. The district court rejected respondent's initial theory that criticisms of her interpersonal skills were pretextual (Pet. App. 46a). The court found it "clear" that "the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination" (*ibid.*). According to the district court, respondent's "conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision" (*id.* at 46a-47a).

Respondent further argued that, even if her interpersonal skills were deficient, petitioner discriminated by admitting men with similar problems into the partnership. The district court, however, found that the evidence did not support this theory (Pet. App. 48a-51a). The court found that petitioner "had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself" (*id.* at 48a).

The third theory advanced by respondent was that petitioner's decision-making process was tainted by sexual stereotyping. Respondent alleged that male partners who criticized her interpersonal skills based their evaluations on their view that assertive behavior is tolerable in men but not in women (Pet. App. 51a-52a). Specifically, respondent cited a number of comments made by male partners, such as the remark that she needed to take a "course at charm school" (*id.* at 51a), and the advice of a partner, who the district court found spoke on behalf of the Policy Board (*id.* at 52a), that respondent ought to walk, talk, and dress "more femininely" (*ibid.*). She also cited comments from the files of other women partnership candidates, such as the remark that one candidate acted like "Ma Barker" (*ibid.*).

The district court found that "stereotyping played an undefined role in blocking [respondent's] admission to the partnership" (Pet. App. 54a). The court also found, however, that the stereotypes reflected in partner comments were "unconscious" as distinguished from intentional (*ibid.*). The court accordingly concluded that "[t]he comments of the individual partners and the expert evidence * * * do not prove an intentional discrim-

inatory motive or purpose" (*ibid.*). In the district court's view, Title VII does not authorize the courts to "police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (*id.* at 55a).

This did not end the district court's inquiry, however. The court went on to find that, "[a]lthough the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole" (Pet. App. 56a). The court accordingly held that because of its "failure to take the steps necessary to alert partners to the possibility that their judgments may be biased, to discourage stereotyping, and to investigate and discard, where appropriate, comments that suggest a double standard" (*id.* at 57a-58a), petitioner had violated Title VII.

The district court then turned to the issue of remedy. The court acknowledged that it could not say that petitioner "would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations" (Pet. App. 59a). Relying on *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980), and *Day v. Mathews*, 530 F.2d 1083, 1085-1086 (D.C. Cir. 1976), however, the court stated (Pet. App. 59a) that "once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." The court found that petitioner had not met this burden, and thus that respondent was entitled to relief.¹

3. The court of appeals affirmed the ruling that petitioner violated Title VII (Pet. App. 1a-39a). The majority held that there was sufficient evidence to support the finding that a sexual stereotype—*i.e.*, that females should not be assertive—infected the partnership decision-making process. The court of appeals believed that this finding meant that respondent "was treated

¹ The district court held, however, that respondent failed to prove that she had been constructively discharged. Accordingly, the court limited respondent's relief to a declaratory judgment and attorney's fees. Pet. App. 60a-61a.

less favorably than male candidates because of her sex" (*id.* at 19a). The court held that this fact "is sufficient to establish discriminatory motive; the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it" (*ibid.*).

The court of appeals then rejected petitioner's argument that respondent failed to prove "the exact impact that stereotyped comments had on the Board's ultimate decision" (Pet. App. 19a). The court held that the district court "had ample support for its conclusion that stereotyping played a significant role in blocking [respondent's] admission to the partnership" (*id.* at 20a). Once respondent proved that fact, the court of appeals reasoned, petitioner bore the burden "to show that the decision would have been the same absent discrimination" (*id.* at 22a-23a). The court of appeals concluded that respondent did not carry that burden by clear and convincing evidence (*id.* at 25a).²

Judge Williams dissented. He believed that there was insufficient evidence to support a finding of intentional discrimination (Pet. App. 38a). He noted that the district court found that petitioner's stated reason for not promoting respondent—that she had poor interpersonal skills—was not a pretext; thus at most respondent had proved "generalized discrimination" or the "existence of sexist attitudes" in the workplace (*ibid.*). Accordingly, Judge Williams concluded that respondent had not proven that she had been treated differently because she is a woman.

SUMMARY OF ARGUMENT

1. Decisions in the lower courts are in a state of considerable disarray both as to the meaning of the requirement that the plaintiff must have suffered loss of employment opportunities "because of" illegal discrimination—the causal requirement of

² The court of appeals reversed the aspect of the judgment not awarding equitable relief for constructive discharge (Pet. App. 27a).

Title VII—and as to the procedures for establishing liability and entitlement to relief. The petition (Pet. I, 12) frames these issues in terms of the proper treatment of Title VII cases involving “mixed motives,” that is, cases in which the evidence shows that both discriminatory motives and nondiscriminatory motives played some role in reaching a particular employment decision. Although a number of lower courts have looked at the issue in this way, we think that the correct legal analysis should not vary depending on whether the case is categorized as one involving “mixed motives” or “single motives.” Virtually every Title VII disparate treatment case will to some degree entail multiple motives. Thus, if the elements of Title VII liability or the burden of persuasion differs depending on the “proper” categorization of a case as involving either mixed or single motives, litigation will focus on what label should be affixed to cases, rather than on the ultimate question in every Title VII case: whether the defendant has discriminated against the plaintiff on the basis of a prohibited criterion.

Title VII, in the tradition of the common law of torts, plainly requires a causal connection between an adverse employment decision and the plaintiff’s race, color, religion, sex, or national origin. This conclusion is compelled by the language of Section 703 of Title VII, 42 U.S.C. 2000e-2, its legislative history, and this Court’s decisions. But neither the statute nor this Court’s decisions specify how causation is to be defined. In these circumstances, we think that the proper meaning of causation under Title VII should be determined by looking to the common law. We do not agree, however, with those courts that have characterized the common law as imposing a rigid “but for” definition of causation, requiring that the illegal motive be a necessary condition of the challenged decision. The most accurate description of the common law test is that an illegal motive is a “cause” of a given outcome if the motive was sufficient by itself to produce the outcome, or if it was a necessary element in any set of motives that together was sufficient to produce the outcome. This test comports with common sense notions of causation by recognizing that, in the case of two in-

dependent and sufficient motives, each motive should be regarded as a “cause” rather than neither. All Title VII cases—whether they involve one, two, or many motives—may be resolved under this common law view of causation.

A Title VII plaintiff bears the burden of proving causation. The Court has often held that the plaintiff bears the burden of “persuading the court that she has been the victim of intentional discrimination.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). And the plaintiff is such a “victim” only if the employer’s illegal motive caused an adverse employment decision. A contrary rule that would shift the burden of proof on causation to the defendant is not required by the policies of Title VII, and would present severe problems in defining the threshold showing that the plaintiff would have to make before such a shift would occur.

2. Although the plaintiff bears the burden of persuasion in proving liability under Section 703 of Title VII, Section 706(g), which sets forth the remedies for Title VII violations, allows a defendant to limit the plaintiff’s remedy by showing by a preponderance of the evidence that it would have reached the same employment decision even in the absence of an illegal cause. Section 706(g) thus expresses the same concern as this Court announced in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977): that a plaintiff should not be placed in a better position than she would have occupied in the absence of the illegal discrimination.

3. The evidence in this case may support a finding that an illegal motive caused petitioner’s decision not to promote respondent. The lower courts, however, did not make this finding. They based petitioner’s liability on evidence of stereotyping—that is, comments by some of petitioner’s partners suggesting that women should not be aggressive or assertive. But the expression of stereotypes, by itself, is not a Title VII violation. Rather, comments reflecting stereotypes should be regarded as evidence of illegal conduct. To make out a case of illegal sex discrimination, respondent must prove that use of a sex stereotype was part of a motive that in fact disadvantaged her. Thus, the case should be remanded for the district court to

determine whether respondent was rejected as a partner at least in part because of negative votes that were motivated by the view that she is too aggressive for a woman.

ARGUMENT

I. TITLE VII REQUIRES A PLAINTIFF CLAIMING DISPARATE TREATMENT TO SHOW THAT AN ILLEGAL MOTIVE CAUSED AN ADVERSE EMPLOYMENT DECISION

This case requires consideration of a number of basic questions about the role of causation under Title VII: Does Title VII require a causal link between a discriminatory motive and an employment decision? If so, how is the concept of "cause" to be defined in the Title VII context? Does Title VII impose a different analysis of causation in mixed motive cases than in single motive cases? Who bears the burden of proving causation? And may a defendant limit the plaintiff's remedy if the defendant proves that, in addition to an illegal cause, an independent and wholly valid motive also explains the employment decision? The Court should resolve those questions in light of the language and policies of Title VII, supplemented, where appropriate, with reference to the understanding of the concept of causation that has developed in the common law.

A. Causation Is a Required Element of Liability Under Title VII

There is no doubt that causation is a necessary element of Title VII liability. Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (emphasis added), provides that it shall be an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin * * *."³ The words

³ Similarly, Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2) (emphasis added) provides that it shall be an unlawful employment practice to limit, segregate, or classify employees "in any way which would deprive or tend to deprive any

"because of" plainly connote a causal connection between the employment decision and the "individual's race, color, religion, sex, or national origin."⁴

This Court's Title VII decisions reflect this understanding. The Court has described the evidentiary showing required to establish liability in the disparate treatment context in a variety of ways. Virtually all of these formulations, however, employ one or more synonyms for causation. See, e.g., *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984) (emphasis added) (question is whether "the particular employment decision at issue was made *on the basis of* race"); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasis added; footnote omitted) (question is whether "an employment decision was *based on* a discriminatory criterion illegal under the Act"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (emphasis added) ("no more is required to be shown than that race was a '*but for*' cause").

Title VII's legislative history leads to the same conclusion. One of the most pointed objections to the legislation that eventually became Title VII was that it would impose liability on an employer for entertaining bad thoughts. As Senator Ervin put it in an extended colloquy with Senator Case, the Republican floor manager of Title VII, it was feared that Title VII was a "thought control bill" (110 Cong. Rec. 7254 (1964)). Senator Case rejected this claim in the strongest terms, noting (*ibid.* (emphasis added)) that the defendant "must do or fail to do something in regard to employment. There must be a specific external act, more than a mental act. Only if he does the act *because of* the grounds stated in the bill would there be any legal consequences." As this makes clear, Title VII does not impose liability for discriminatory animus without more. It imposes

individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin."

⁴ See, e.g., *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 508, 111 P. 534, 538 (1910) ("To trace an injurious distinction from the use of the phrase 'because of,' instead of the phrase 'caused by' is merely logomachy.").

liability only when a discriminatory motive *causes* an adverse decision with respect to the compensation, terms, conditions, or privileges of employment.

It would, of course, have been highly unusual had Title VII not required some causal link between an illegal motive and the challenged employment decision. Throughout the law of torts, contracts, and those aspects of criminal law where liability is defined in terms of bringing about a proscribed result, it is not enough to show that the defendant violated a legal rule and that the plaintiff suffered a harm; it is also necessary to prove that the breach of duty *caused* the harm. See generally O. Holmes, *The Common Law* 160 (1881); Pound, *Causation*, 67 Yale L. J. 1, 10-14 (1957); cf. *Valley Forge Christian College v. Americans United For Separation of Church & State*, 454 U.S. 464, 472 (1982). For example, a defendant may act negligently in breach of a general duty of care, but he is not liable in tort unless his negligence causes harm to the plaintiff. See *Restatement (Second) of Torts* § 430 (1965). The causal language of Section 703(a) shows that Congress legislated the same understanding when it enacted Title VII.

B. Causation Is Established if an Illegal Motive Was Sufficient by Itself for an Adverse Employment Decision, or if an Illegal Motive Was Necessary in Combination with Another Motive or Motives for the Decision

Although causation is plainly an element of Title VII liability, neither the statute nor this Court's decisions specify how causation is to be defined. The only significant legislative history that sheds light on this question occurred when Senator McClellan introduced an amendment that would have modified Section 703(a) to provide that a Title VII violation could be found only if an employment decision was taken "*solely* because of" an impermissible motive. In effect, the McClellan amendment would have eliminated any possibility of Title VII liability in mixed motive cases—where an employment decision is in part the product of discriminatory motives, and in part the product of non-discriminatory motives. The Senate rejected the amendment, as did the House (see 110 Cong. Rec. 2728, 13838 (1964)). In opposing the proposal, Senator Case remarked (*id.* at 13837):

The difficulty with this amendment is that it would render title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

The rejection of Senator McClellan's proposed amendment is persuasive evidence that Congress contemplated that Title VII liability could be established where the employment decision is the product of multiple or "mixed" motives. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 282 n.10 (Title VII plaintiff need not show "that he would have in any event been rejected or discharged solely on the basis of his race, without regard to [other] alleged deficiencies"). But beyond that, the legislative history, like the statute itself, provides little explicit guidance in defining what role a discriminatory motive must play in producing an employment decision before it can be called a "cause."

The problem is, however, a familiar one in the law. As every common lawyer knows, any event—and certainly an event as complex as an employment decision—may be described as the consequence of literally an infinite number of antecedents. "This is the 'cone' of causation, so called because, since any event has a number of simultaneous conditions, the series fans out as we go back in time." H. Hart & T. Honore, *Causation in the Law* 69 (2d ed. 1985) (citation omitted). The task for the courts is to pick out of the infinite manifold of antecedents those which it is sensible, relative to the purpose at hand, to emphasize as the cause or causes of an event.⁵ As Congress im-

⁵ For instance, when describing the cause of a fire the presence of oxygen in the environment may or may not be appropriately picked out for mention—if the context is a scientific experiment or a space vehicle accident the mention may be quite appropriate, while in a case of domestic arson it obviously would not. See H. Hart & T. Honore, *Causation in the Law* 35 (2d ed. 1985).

plicitly recognized in rejecting the McClellan amendment, this process cannot be accurately stated in terms of whether a particular factor is the *sole* cause of a particular event. Rather, what is needed is an analytical framework for picking out for special attention those antecedents which may be denominated as causes as opposed to "mere" background conditions.

The lower courts are divided on how to define the requisite standard of causation in cases in which one of the parties—generally the defendant—has made an issue of the multiplicity of motives. Some courts believe that Title VII requires proof that the discriminatory motive was a necessary condition or "but for" cause of the employment decision. See, e.g., *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). In this view, there can be no liability under Title VII if the same decision would have been reached in the absence of an illegal motive. Other courts hold that Title VII requires proof that the discriminatory motive was a "motivating factor" or a "significant factor." See, e.g., *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987). The courts that have adopted the "necessary condition" or "but for" standard have done so, at least in part, on the understanding that this is the minimal definition of causation traditionally required by the common law. In contrast, the courts that have rejected that test in favor of the "motivating factor" standard have cited decisions of this Court adjudicating constitutional claims (see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-286 (1977)), and the concern that the "but for" test is too stringent a burden.

We agree with those courts that look to traditional judicial understandings of causation—i.e., the common law—as the benchmark for defining causation under Title VII. Contrary to the usual formulation by these courts, however, we do *not* understand the common law to require the plaintiff to make a showing of "but for" causation in every case. A more accurate

description of the common law test for causation, we think, is that an illegal motive is a "cause" of a given outcome if the motive was sufficient by itself to produce the outcome, or if it was a necessary element in any set of factors that together was sufficient to produce the outcome. See H. Hart & T. Honore, *supra*, at 107-129; Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1789-1790 (1985). This is not the same as "but for" causation, because an illegal motive can be a cause of an outcome even if a legitimate motive or a set of legitimate motives was also sufficient to produce that outcome.

This is essentially the test for causation under the *Restatement (Second) of Torts* (1965). Section 431 of the *Restatement* provides that negligent conduct is a "cause of harm to another if" it is "a substantial factor in bringing about the harm." Section 432 of the *Restatement* then states:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

In other words, Section 432(1) initially provides that the actor's negligence is a cause ("substantial factor" in the *Restatement's* terms) only if it is a necessary condition ("but for" cause) of the harm; but Section 432(2) then adds the proviso that the actor's negligence is also a cause if it was *sufficient* to bring about the harm, even if other forces were present that were also sufficient to generate the harm. In the end, therefore, the *Restatement* rejects a rigid "but for" notion of causation in favor of a sufficiency view.⁶

⁶ The common law test of causation differs from the "but for" view of cause in cases of overdetermined outcomes. A motive can be a "cause" under the common law test even if another motive or set of motives was sufficient for

We believe that the common law test outlined above should apply to Title VII cases in the following way. Suppose a partnership has a rule that it will deny admission to anyone who receives four or more negative votes. If a candidate receives two negative votes because she is a woman, and three because of her abrasive personality, then the two discriminatory votes would be a cause of the decision (the discriminatory votes are a necessary element of a set of four or more votes sufficient to produce the outcome). Alternatively, if the plaintiff receives four negative discriminatory votes, and five negative votes based on her personality, then the discriminatory votes would *also* be a cause (the discriminatory votes being sufficient in themselves to produce the outcome), even though it cannot be said that the discriminatory votes are a "but for" cause. Only if

the outcome. A motive is a cause if it was sufficient, by itself or in combination with other factors, to produce the result. The common law thereby avoids the troublesome implication of "but for" causation that, in cases with multiple sufficient causes, there would be *no* cause. As Hart and Honore state, in the case of dual sufficient conditions, "a legal system should treat each as the cause rather than neither." H. Hart & T. Honore, *supra*, at 124. Accord W. Prosser, *Law of Torts* 239 (4th ed. 1971).

The somewhat confusing formulation of the *Restatement*, which appears first to embrace and then to reject the "but for" test, reflects more a dispute among academics than a substantial uncertainty in the case law or even in the intuitions of common sense. Common sense notions of causation reflect simple models in which a force is applied to produce a result—e.g., a brick is hurled through a window, or a person is pushed in front of a train. See Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 166-169 (1973). And such models implicitly depend on a sufficiency view of causation. Some legal scholars, believing both common sense and the common law to be insufficiently scientific and rigorous, proposed distinguishing between "cause in fact"—a supposedly scientific and rigorous test—and "proximate cause" or "legal cause"—an additional hurdle to be cleared by plaintiffs which was conceded to be "evaluative" and to allow for policy judgments. See R. Keeton, *Legal Cause in the Law of Torts* vii-ix (1963); L. Green, *Rationale of Proximate Cause* 200 (1927). As Hart & Honore demonstrate, however, the case law does not accord with this neatly dichotomous view. Moreover, any analytic rigor dissolves in the face of troublesome counterexamples, such as those of multiple sufficient causes. At the end of the day, the common law, common sense, and the *Restatement* all support a sufficiency view.

the discriminatory votes were not sufficient either by themselves or in combination with other votes could it be said that the discriminatory votes were not a cause of the decision. For example, if a candidate received three negative votes because she was a woman, but no other negative votes, and the partnership then decided unanimously for economic reasons not to make any new partners, the three negative votes would not be sufficient in themselves to produce the result, nor would they be a necessary element in any set of conditions sufficient to produce the result (the decision to defer making partners on economic grounds being sufficient in itself without the added element of the discriminatory votes).⁷

Because this concept of causation relies on the ideas of "necessity" and "sufficiency," it comports with what we mean when we say that something "caused" a result—*i.e.*, that it contributed to, or made a difference to, the outcome. Indeed, this may be implicit in the lower court decisions that adopt a "significant factor" test. To say that intentional discrimination was a "significant factor" or a "motivating factor" necessarily implies that it was a *factor*—that it affected the outcome. On the other hand, to denominate a motive a "cause" if it did not produce the outcome, either by itself or in combination with other elements, is to abandon the statutory requirement of causation.

⁷ The common law view that we propose is not foreclosed by *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The Court in *McDonald* held that an employer must apply its disciplinary rules "alike to members of all races" (*id.* at 282, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). In dictum, the Court noted that a plaintiff need not prove that he would have "been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies; * * * no more is required to be shown than that race was a 'but for' cause" (427 U.S. at 282 n.10). This statement was not necessary to the Court's holding, and it simply indicates that Title VII liability attaches if the plaintiff proves "but for" causation; the statement does not foreclose liability by proof of a different type of causation—one based on the notion of sufficiency.

C. In Determining Liability Under Title VII, "Mixed Motive" Cases Should Be Treated the Same as "Single Motive" Cases

In assessing the role of causation under Title VII, a number of lower courts have suggested that either the definition of causation or the burden of persuasion in establishing causation should vary depending on whether the case is categorized as one involving "mixed motives" or "single motives." See, e.g., *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 709-712 (6th Cir. 1985). We think this is a mistake. As noted above, Congress recognized that virtually every disparate treatment case will to some degree entail multiple causes. Thus, if the elements of Title VII liability or the burden of persuasion differs depending on the "proper" categorization of a case as involving either mixed or single motives, the predictable result will be pointless litigation over what label should be affixed to cases, rather than on the *ultimate* question in every Title VII case: "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15).

Nor do we think this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), support the notion that disparate treatment cases should be divided between those involving single motives and those involving mixed motives. *McDonnell Douglas* and *Burdine* adopted the now familiar three-step procedural process for resolving disparate treatment cases. Under this process, the plaintiff must initially establish a *prima facie* case of employment discrimination;⁸ if the plaintiff is successful, the defendant must then come for-

⁸ The plaintiff must show that she (1) is a member of a protected class; (2) that she sought and was qualified for an employment opportunity which was available; (3) that despite her qualifications she was rejected; and (4) that after her rejection the employer continued to seek qualified applicants for the position (see *McDonnell Douglas*, 411 U.S. at 802).

ward with evidence tending to show that the adverse action was taken for legitimate, nondiscriminatory reasons; if the defendant's evidence raises a genuine issue of fact, then the plaintiff must introduce evidence tending to show either that the defendant's explanation "is unworthy of credence," or that "a discriminatory reason more likely motivated the employer" (*Burdine*, 450 U.S. at 256). Although a number of courts have suggested that this framework applies only to single motive cases, and that mixed motive cases must be analyzed under a different framework, we think that the *McDonnell Douglas-Burdine* framework is well suited to *all* disparate treatment cases.

This Court's decisions make clear that the *McDonnell Douglas-Burdine* framework is not a process for uncovering which of two possible explanations is the "sole" cause of an employment decision. Rather, the framework employs what are in effect a series of "presumption[s]" about causation in order to simplify the production of evidence and proof in disparate treatment cases and to frame the contested factual issues with "sufficient clarity" (*Burdine*, 450 U.S. at 255). Thus, if the plaintiff establishes a *prima facie* case and the defendant fails to introduce evidence of a legitimate, nondiscriminatory explanation for the employment decision, this "in effect creates a presumption that the employer unlawfully discriminated against the employee" (*id.* at 254). See also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Similarly, if the defendant comes forward with a legitimate, nondiscriminatory explanation, but the plaintiff demonstrates to the satisfaction of the trier of fact that the explanation is a pretext, then again the trier of fact is entitled to presume from the plaintiff's *prima facie* case that the decision was caused by discrimination. *Burdine*, 450 U.S. at 256. On the other hand, if the defendant comes forward with a legitimate, nondiscriminatory explanation, and the plaintiff fails to show that it is a pretext, then the trier of fact is entitled to presume that the employment decision was *not* caused by discrimination.

Clearly, the fact that the *McDonnell Douglas-Burdine* framework relies on certain *presumptions* about causation in no way suggests that employment decisions are always or even usually the product of one cause. Indeed, *Burdine* expressly contemplates that the plaintiff may attempt to answer the defendant's explanation by introducing evidence tending to show an alternative, discriminatory explanation for the decision. If the plaintiff follows this course, then the court is presented at trial with what is in effect a case of mixed motives: the defendant has offered one explanation, and the plaintiff another. It would be artificial to insist in such a case that the "true" explanation must always be either one or the other, and never (as Senator Case indicated (see page 11, *supra*)) some combination of both. And it would be even more problematic to insist that, if the explanation is some of both, the case must be decided under some altogether different doctrinal rubric. To determine liability by first applying the *McDonnell Douglas-Burdine* framework and then, if it appears at the trial that there were mixed motives, to superimpose some burden-shifting procedure on top of this framework, would be to compound procedural refinements in a confusing and ultimately unproductive fashion. As we explain below (pages 21-24, *infra*), we think that the burden-shifting adopted by *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyles*, 429 U.S. 274 (1977), is appropriately brought to bear in Title VII suits at the remedial stage, where distinct issues are involved and there is a separate statutory basis imposing the burden on the defendant. To apply this doctrine at the liability stage, however, would simply make the "inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof' in deciding this ultimate question." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (citation omitted).

In sum, we believe that *all* Title VII disparate treatment cases should be resolved under the *McDonnell Douglas-Burdine* framework, whether they involve one, two, or multiple possible causes. In many of these cases, the issue of causation will be

resolved by presumption, and thus need not be confronted directly. But when all the presumptions are exhausted, the court must then "decide the ultimate factual issue in the case" (*Aikens*, 460 U.S. at 715). As set forth in Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), that issue is whether the plaintiff suffered discrimination "because of" his or her race, color, religion, sex, or national origin.

D. The Plaintiff Bears the Burden of Persuasion on Causation

Since causation is a necessary element of Title VII liability, then under this Court's decision in *Burdine* it follows that the plaintiff has the burden of persuasion on this element. The Court noted in *Burdine* that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff" (450 U.S. at 253). In other words, the plaintiff bears the burden of "persuading the court that she has been the *victim* of intentional discrimination" (*id.* at 256 (emphasis added)). And, as we have shown, the plaintiff is such a "victim" only if the employer's illegal motive caused the adverse employment decision.

That the plaintiff bears the burden of persuasion on the element of causation is reinforced by the legislative history of Title VII. In the Senate debates, Senator Dirksen offered the following objection to the proposed House bill (110 Cong. Rec. 7218 (1964)): "If the employer discharges a Negro, he must prove that the dismissal has nothing to do with race. When an employer promotes or increases the pay of a white employee, he must show that he was not biased against the Negro worker who was not promoted." Senator Clark, the Democratic floor manager of Title VII, corrected Senator Dirksen's misunderstanding (*ibid.* (emphasis added)): "*The Commission* must prove by a preponderance [of the evidence] that the discharge or other personnel action was because of race." This allocation of the burden of persuasion on the charging party was reiterated by Senator Case as part of his extended exchange with Senator Ervin over whether Title VII would impose liability for discriminatory thoughts (*id.* at 7255 (emphasis added)): "The

only way a state of mind can be proved is by an external act, or by a pattern of acts, of a man, or by a treatment that was given. *The burden of proof is on the plaintiff.*"

There is no special need in the Title VII context to deviate from the general tort rule that the plaintiff bears the burden of showing causation (see *Restatement (Second) of Torts* § 433B (1965)). The common law view of causation that we outlined above, in contrast to a strict "but for" view, does not impose an undue burden on Title VII plaintiffs. The plaintiff need prove causation, like any other element of liability, only by a preponderance of the evidence. In a case of multiple motives, therefore, the plaintiff must show only that it was more likely than not that the discriminatory motive was sufficient to produce the result. The plaintiff need not exclude the possibility that legitimate reasons were also sufficient to produce the outcome. Moreover, although the defendant will usually have better access to facts about why the plaintiff was denied an employment opportunity, this unevenness is largely eliminated because the defendant already has the burden of producing any evidence tending to show a legitimate explanation at stage two of the *McDonnell Douglas-Burdine* framework. As this Court has observed, the defendant has "an incentive to persuade the trier of fact that the employment decision was lawful" and thus "normally will attempt to prove the factual basis for its explanation" (*Burdine*, 450 U.S. at 258).

On the other hand, a rule that required the burden of proof on causation to shift to the defendant would present severe problems in defining the "threshold" showing that the plaintiff would have to make before such a shift would take place. The lower courts that have endorsed burden-shifting have generally required the plaintiff to show that an illegal motive was a "significant factor" or a "motivating factor" in the decision before shifting the burden to the defendant (see page 12, *supra*). If this means the plaintiff must show that the illegal motive made a difference to the outcome—that it was a necessary element of a set of conditions sufficient to yield the result—then this is just another way of saying that the plaintiff must show causation to establish liability: the position we endorse. But if it

means that discrimination must be present, but that it need not be such as to have contributed to the outcome, then it is hard to differentiate this from shifting the burden to the defendant merely upon the showing that there was "discrimination in the air." Other possible formulations of the threshold showing—such as that there is "some evidence" of causation—would also involve radical departures from established formulations for apportionment of the burden of proof in civil litigation. There are no principles that can be derived from the language of Title VII, its legislative history, or common law precedent that instruct how much evidence the plaintiff must produce—short of the traditional preponderance standard—before the burden shifts. Accordingly, there is no legal justification for treating the plaintiff's proof of causation "differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

II. A DEFENDANT MAY LIMIT THE PLAINTIFF'S REMEDY BY SHOWING THAT THE EMPLOYMENT DECISION WOULD HAVE BEEN THE SAME WITHOUT THE ILLEGAL CAUSE

Although causation is a necessary element of liability under Title VII, and although the plaintiff bears the burden of persuasion on this issue as on all other elements of liability, it does not follow that the plaintiff in a disparate treatment action must necessarily bear the burden of persuasion of showing that she is entitled to the fullest measure of relief.

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, *supra*, the plaintiff alleged that he was not rehired as a teacher because he had engaged in constitutionally protected speech. This Court held that "the burden was properly placed upon" the plaintiff "to show that his conduct was constitutionally protected," and that this conduct "was a 'motivating factor' " in the school board's decision (429 U.S. at 287 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. at 270-271 & n.21)). As we understand it, a "motivating factor" is simply a "cause" as that term is defined by the common law—*i.e.*, a

necessary element in a set of factors that are jointly sufficient to produce the outcome. See *Mt. Healthy*, 429 U.S. at 286 ("A borderline or marginal candidate should not have the employment decision resolved against him because of constitutionally protected conduct."); see also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (General Counsel of NLRB has burden of showing that "antiunion animus contributed to the employer's decision to discharge an employee").

The Court in *Mt. Healthy*, however, further held that the defendant may attempt to convince the trier of fact "that it would have reached the same decision * * * even in the absence of the protected conduct" (429 U.S. at 287). The Court in effect qualified the result that would have obtained under the common law's sufficiency standard by allowing the defendant to show that the plaintiff would obtain an undeserved windfall if he received back pay for the failure to place him in a job which would not have been his in any event. See *id.* at 285; see also *Transportation Mgmt. Corp.*, 462 U.S. at 401 (employer shown to have acted at least in part out of antiunion animus has burden to show that "he would have acted in same manner for wholly legitimate reasons").⁹

Similarly, Title VII gives a defendant the opportunity to prove that it would have reached the same employment decision in the absence of an illegal cause. Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), reveals that Congress had the same concern

⁹ *Mt. Healthy's* reluctance to award the full measure of relief in circumstances where the common law would have imposed liability—and the full measure of damages—may perhaps be explained by the fact that the common law was usually concerned with awarding compensation for discrete harms incurred in the past, whereas *Mt. Healthy*, *Transportation Mgmt.*, and Title VII are concerned with on-going employment relationships. Just as the common law is reluctant to award specific enforcement of an employment contract (see *Restatement (Second) of Contracts* § 367 (1981)), so the Court and Congress have been reluctant to require an employer to hire, reinstate, or promote an employee who is not qualified to perform the employer's work, even if the employee has been the victim of intentional discrimination at the hands of the employer. Also, because of the on-going nature of the employment relationship, injunctive relief provides a meaningful form of redress here, which is not true in the case of discrete injuries incurred in the past.

as the Court in *Mt. Healthy*: that a plaintiff should not be placed in a better position than she would have been in the absence of an illegal motive. This section provides that, if a court finds that liability is established, it may "order such affirmative action as may be appropriate." But Section 706(g) goes on to provide that the court may not order "hiring, reinstatement * * * promotion * * * [or] back pay" if the court finds that employment decision was "for any reason other than discrimination." In other words, in cases where there are multiple sufficient causes for the employment decision, and one of those causes is a set containing only nondiscriminatory motives, Section 706(g) provides that reinstatement and backpay may not be awarded, because the set of sufficient nondiscriminatory motives was a "reason other than discrimination."

Because Section 706(g) deals with the question of remedies, as distinguished from the elements of a Title VII violation, it is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 447 (1986) (plurality opinion); *Transportation Mgmt. Corp.*, 462 U.S. at 402. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff, because such relief would "place an employee in a better position as a result of the [defendant's discriminatory conduct] than he would have occupied had [the defendant] done nothing." *Mt. Healthy*, 429 U.S. at 285.¹⁰

¹⁰ The defendant's burden of proof under Section 706(g), just as the plaintiff's burden under Section 703, should be governed by the "preponderance of the evidence" standard. The "preponderance" standard is the normal rule in civil litigation, and there is no reason that a different rule should apply under the civil rights laws. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Cf. *Kungys v. United States*, No. 86-228 (May 2, 1988), slip op. 14

Although the Court has not expressly endorsed this reading of Section 706(g), it has reached analogous conclusions in related Title VII contexts. See *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (noting that if a "company's failure even to consider * * * applications was discriminatory," then "the company was entitled to prove at trial that the respondents * * * were not qualified and would not have been hired in any event"); *International Bhd. of Teamsters v. United States*, 431 U.S. at 359 (once class liability is found, individual relief can be limited if defendant shows that he would have made the challenged decision for lawful reasons); see also *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) (Kennedy, J.) ("the burden of proof is on the employer * * * and to avoid back pay the employer must show that, absent the discrimination, the applicant * * * would not have been hired"); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) ("it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish * * * the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). Thus, Section 706(g) should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse employment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination.

III. STEREOTYPING, WITHOUT MORE, DOES NOT CONSTITUTE A VIOLATION OF TITLE VII

The district court rested its finding of intentional discrimination on the presence of comments reflecting sexual "stereotypes" in petitioner's decision-making process—*i.e.*, comments made

("the difficulty of establishing 'but for' causality, by clear, unequivocal, and convincing evidence many years after the fact, is so great that we cannot conceive that Congress intended such a burden to be met"). Thus, the lower courts in this case clearly erred in using a "clear and convincing" evidence standard in this regard (Pet. App. 25a, 59a).

by some evaluating partners about how women should or most women do comport themselves—coupled with a finding that petitioner did nothing to disavow these comments or to ensure that they did not affect the ultimate decision. These findings, we believe, are insufficient to establish liability under Title VII. Title VII, as we have noted above, is not a "thought control bill"; "[t]here must be a specific external act, more than a mental act." 110 Cong. Rec. 7254 (1964) (Sen. Case). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (sexual harassment violates Title VII only if it is sufficiently severe to alter the conditions of the victim's employment). Stereotyping, as defined by the courts below, is the harboring and perhaps expression of certain opinions about behavior appropriate to or typical of certain groups. The harboring and expression of such views, by itself, does not violate Title VII. As relevant here, Title VII bans discriminatory treatment because of sex, not stereotypical thoughts.

Of course, this does not mean that stereotyping is irrelevant under Title VII. Such opinions and their expression are generally offensive to members of the group so characterized, even where the stereotype may not be intrinsically demeaning. And the reason for that, of course, is that persons properly resent being judged as members of groups rather than as individuals. The offense is compounded where the stereotype is unflattering, or suggests that the members of the group possess undesirable characteristics. Such statements are highly probative evidence of discriminatory intent. Indeed, the repeated utterance of highly offensive stereotypes might in appropriate contexts be enough in itself to constitute a form of racial or sexual harassment justifying the imposition of Title VII liability. See *Henson v. City of Dundee*, 682 F.2d 897, 901-902 & n.4 (11th Cir. 1982).

But where the claim is made, as it is here, that there has been discrimination because of sex in making a particular employment decision, more is needed than the showing that those who made the decision harbored or even gave voice to stereotyping opinions. Those opinions must be shown in some way to have disadvantaged respondent in her request for promotion and

thus have played a causal role in her being denied that promotion. As we have said, even a positive or neutral stereotype will often be offensive to its victim, but the bigot (and the harboring of stereotypes is a pretty good definition of bigotry) may in fact be disposed *in favor*, for stereotypical reasons, of an unsuccessful applicant for a position. In order to make out a case of discriminatory denial it must be shown that the stereotyping was part of a motive which improperly disadvantaged the applicant. Although in many instances stereotyping will provide strong evidence of discrimination, a court may not jump over the intermediate step of showing discriminatory disadvantage and pass directly from stereotyping to liability.

In short, a narrow focus on "stereotyping" obscures the crux of liability under Title VII—disparity of *treatment* because of sex or some other proscribed criterion. An employer may of course legally base employment decisions on concerns that an employee is too aggressive, abrasive, or profane. But in doing so, the employer must apply its standard evenhandedly; "aggressiveness," "abrasiveness" and "bad language" cannot be the bases for rejecting female, but not male, candidates. In all events, use of and controversy over the meaning of the term "stereotype" should not distract the parties and the court from the ultimate issue: whether the plaintiff can show by a preponderance of the evidence that she was denied an employment opportunity because of her sex.

IV. THE CASE SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THE CORRECT LEGAL STANDARDS

As the foregoing discussion suggests, we believe that both the court of appeals and the district court committed fundamental legal errors. The court of appeals held (Pet. App. 22a-23a, 25a) that the burden of persuasion on causation shifts to the defendant at the liability stage, and requires the defendant to prove by clear and convincing evidence that the same decision would have been made notwithstanding the presence of discriminatory animus. The district court also appears to have adopted (*id.* at

54a) an improper standard of causation, and may have endorsed a theory of liability based on the mere presence of "stereotyping" in the decision-making process. The district court never found that discrimination caused petitioner's decision—*i.e.*, that respondent was treated differently because she is a woman. Hence, the case should be remanded to the district court to determine whether discrimination, as evidenced *inter alia* by stereotyping comments, caused the decision not to promote respondent.

There may be sufficient evidence in the record to support a finding that an illegal motive caused petitioner's employment decision. The district court found that the head partner at the office where respondent worked was the person "responsible for telling [respondent] what problems the Policy Board had identified with her candidacy" (Pet. App. 52a). This partner, in counseling respondent about what she should do to overcome the reservations of the Policy Board, told respondent "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (*ibid.* (footnote omitted)). This evidence could support a finding that the decision to deny respondent partnership was caused, at least in part, by an impermissible motive.¹¹ Comments made by evaluating partners—*e.g.*, that respondent should take a "course at charm school" (*id.* at 51a) and that she is "macho" (*id.* at 52a)—are consistent with this assessment of the reasons for the Policy Board's decision. These comments, whether termed "stereotypes" or something else, may be appropriately considered as evidence that respondent's sex determined the outcome of the evaluation process and that she was treated less favorably because she is a woman. See *Furnco Constr. Corp. v. Waters*, 438 U.S. at 578 (evidence of discriminatory intent may "take a variety of forms").

¹¹ The Equal Employment Opportunity Commission has noted that the expression of stereotypical attitudes about whether women should be aggressive is evidence of disparate treatment because of sex. See Dec. No. 74-15, 1983 CCH EEOC DEC ¶ 6394 (Aug. 7, 1973).

The district court found that “[d]iscriminatory stereotyping of females was permitted to play a part” in the partnership decision (Pet. App. 58a). On the other hand, the district court stated that petitioner “had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself” (*id.* at 48a). On remand, the district court should clarify its findings by asking the critical question under Title VII—did sex discrimination cause petitioner’s decision?¹² And the court should so find only if it believes that respondent showed that it is more likely than not that her sex was a necessary element of a set of reasons jointly sufficient to cause the decision. In other words, respondent will have established Title VII liability if the district court finds that she was rejected because of negative votes that were motivated by the view that she is too aggressive or abrasive *for a woman*.

¹²—In answering this question, the district court will of course be addressing Judge Williams’ concern (Pet. App. 38a) that there may be no causal link between the stereotypical comments and petitioner’s employment decision.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for further proceedings. Respectfully submitted.

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